Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

DONALD L. CLEVELAND and
CHRISTA A. CLEVELAND,

Petitioners,

vs.

BELTMAN NORTH AMERICAN CO., INC. and
NORTH AMERICAN VAN LINES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a jury, after finding that a common carrier acted with such morally culpable conduct and wanton dishonesty as to imply criminal indifference to their civil obligations under a contract to transport household goods subject to the Carmack Amendment to the Interstate Commerce Act of 1887, may award punitive damages under the federal common law tort of breach of the implied covenant of good faith and fair dealing.

2. Whether, notwithstanding the Carmack Amendment's proviso that its remedies are in addition to those existing at common law, Congress has expressly regulated the entire field of interstate shipping so as to preempt federal common law.

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IN THE
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DONALD L. CLEVELAND AND
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BELTMAN NORTH AMERICAN CO., INC. AND
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Donald L. Cleveland and Christa A. Cleveland respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit on this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A 1) is reported at 30 F. 3d 373. Two opinions of the district court are reported. One at 199 U.S. Dist. LEXIS 1635 (N.D.N.Y. 1992) 2 (App., *infra*, A 20) and the other at 154 F.R.D. 37 (N.D.N.Y. 1994) (App.,*infra*, A 114). The remaining opinions of the district court (App., *infra*, A 54, A 73, A 76, A 95, and A 109 are unreported.

JURISDICTION

The court of appeals entered its judgment on July 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the 1906 Carmack Amendment to the Interstate Commerce Act of 1887 which, in relevant part, was recodified in 1978 as follows:

> Except as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law. 49 U.S.C. § 10103.
>
> * * *
>
> The Interstate Commerce Commission may require or authorize a carrier ... providing transportation or service subject to its jurisdiction ... to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by written agreement, when that value would be reasonable under the circumstances surrounding the transportation. 49 U.S.C. § 10730(a).
>
> * * *
>
> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission ... shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier ... and any other common carrier that delivers the property and

> is providing transportation or service subject to the jurisdiction of the Commission ... are liable to the person entitled to recover under the bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States ... when transported under a through bill of lading ... 49 U.S.C. § 11707(a)(1).

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a married couple whose household belongings, after being transported by a common carrier from Iowa to New York, were found to be badly damaged. When settlement of the damage claim could not be reached, petitioners commenced litigation. After trial, a jury awarded petitioners $28,000 in compensatory damages and $50,000 in punitive damages.

Petitioners' household goods were damaged during transportation with a common carrier subject to the jurisdiction of the

Interstate Commerce Commission under 49 U.S.C. § 10521, giving rise to a claim under 49 U.S.C. § 11707 (The Carmack Amendment). The jurisdiction of the district court was invoked under 49 U.S.C. § 11707 (a)(2)(b) which permits civil actions brought under the Carmack Amendment to be brought in United States District Court. The district court also had jurisdiction under 28 U.S.C. § 1331, there being a federal question as the civil action arises under a law of the United States, and under 28 U.S.C. § 1332 because of diversity of citizenship, the petitioner being a citizen of New York and the respondents being citizens of Iowa and Indiana.

The underlying issue in this petition is whether, the conduct of a common carrier which rises to the level of criminal indifference to the rights of the shipper,

falls within the scope of the Carmack Amendment such that a jury's award of punitive damages on a shipper's federal common law tort claim for breach of the implied covenant of good faith and fair dealing must be overturned.

B. STATEMENT OF FACTS

Petitioners contracted with North American Van Lines (North American) and Beltman North American Co., Inc. (Beltman), North American's local agent in Des Moines, to move their household goods and furnishings from West Des Moines, Iowa to Slingerlands, New York in August, 1988. North American and Beltman (respondents) are common carriers as that term is defined by the Interstate Commerce Act, 49 U.S.C. § 10102(4).

During the course of contract negotiations, petitioners told Beltman's salesperson, that they wanted an all-risk

transit replacement cost coverage insurance policy, in the event any damage occurred to their household goods during shipment. In response, Beltman recommended that petitioners purchase, for an additional premium, North American's Replacement Cost Protection Plan ("RCP") which was represented to be insurance coverage even though Beltman's salesperson knew that the RCP plan was not insurance. For an additional $320 petitioners purchased the supplemental protection from North American and it was incorporated into the shipping contract, commonly referred to as the bill of lading.

Interstate Commerce Commission ("ICC") regulations provide that whenever an estimate for service is made by a carrier, several documents explaining the carrier's past performance and the mover's rights and responsibilities must be provided to the

shipper. 49 C.F.R. § 1056.2. Petitioners never received any of the required documents prior to contracting for the move. Beltman's salesman admitted that he had several chances to obtain the petitioners' written acknowledgment that he had provided the documents to petitioners but didn't do so. One of these key documents, Your Rights and Responsibilities When You Move, was not provided by respondents until ten months after the move and not until after suit was filed.

Petitioners' household goods were loaded onto respondents' tractor trailer on August 19, 1988 and, instead of proceeding to New York for delivery on the guaranteed date of August 24, 1988, was driven to Beltman's storage lot in Des Moines where it sat for several days. It was then reloaded onto another tractor trailer and driven to New York where it arrived six days late and in

damaged condition on August 30, 1988. Beltman knew on August 18, 1988 that there was no through driver to drive the load to New York. Despite ICC regulations which require a carrier to notify a shipper as soon as it becomes apparent that a load will be delayed, no notice of delay was given to petitioners.

In addition, shipping documents designed to protect the shipper's interests and necessary to establish a claim for lost or damaged goods during shipment were withheld from petitioners during loading and shipping. For example, the "Item Check Off Sheet" should have been given to the petitioners to check items as they came off the truck not retained by the driver. When copies were finally made available to petitioners, they were unreadable. Once petitioners realized that their goods had been substantially damaged, the

petitioners struck a line through the acknowledgment that the goods were received in good order and wrote a disclaimer.

The record shows that the petitioners load was not loaded in a commercially acceptable manner and that the driver failed to pad most of the load because he ran out of pads. The tractor carrying petitioners' goods was also involved in an accident which tore a hole in the floor of the trailer resulting in rain water soaking most of the cargo.

Petitioners immediately notified respondents of the arrival of their household goods in a damaged condition on August 30, 1988. Even though the Cleveland Claim was very "extensive" and had damaged items that would normally qualify the claim for "Priority" handling, respondents assigned the claim on a "regular" basis and for inspection only.

Petitioners' first written claim was submitted to respondents on September 13, 1988. Supplemental claims were submitted as missing items were discovered including lost business and financial records. Under the bill of lading claims may be filed for lost or missing items up to nine (9) months after the move.

Between August 1988 and February 1989 petitioners were in contact with respondents regarding whether and when a complete settlement of their claim would be made. On February 14, 1989 petitioners received respondents' unilateral offer of settlement of petitioners' entire claim for $9,824.96, approximately one-third of the final amount of compensatory damages awarded by the jury. Petitioners rejected respondents' offer on February 17, 1989.

Respondents answered the petitioners' rejection of their offer with a letter

dated March 30, 1989 which stated, inpart, that "North American will stand on its initial offer".

C. PROCEEDINGS BELOW

Petitioners commenced this legal action in the Federal District Court for the Northern District of New York on April 26, 1989. In their original complaint petitioners alleged several causes of action including respondents' failure to comply with Interstate Commerce Commission (ICC) regulations regarding shipper's rights, fraud in the inducement, negligent misrepresentation, negligence, gross negligence and breach of the contract. The original complaint sought both compensatory and punitive damages.

As the litigation progressed, the petitioners made discovery demands which included requests for "original" documents,

claims adjusting guides or manuals, repair records of the truck involved, and the original photos taken by respondents' agent hired to inspect the damage. Respondents and their then attorney continually claimed that respondents were not in possession of such documents. Finally, after two discovery conferences, held on June 1, 1990 and June 15, 1990, the Magistrate, to whom the discovery dispute had been referred, found the behavior of the respondents and respondents' attorney to be "grossly improper practices", "foot dragging", "stonewalling" and designed to "frustrate the discovery process in a deliberate attempt to obstruct plaintiffs' prosecution of this litigation". (App., *infra*, A 68, A 69-70). The documents claimed not to exist were eventually produced. As a result of respondents and their counsel's conduct, the court imposed sanctions pursuant to

Fed. R. Civ. P. 37. Petitioners were awarded attorney's fees in the amount of $5,860. These actions by respondents to impede and frustrate discovery further delayed the fair adjustment of the petitioners' claim. Following the resolution of the discovery dispute, Chief District Judge McCurn granted petitioners' motion to amend their complaint to include a federal common law claim for the bad faith tort of breach of the implied covenant of good faith and fair dealing and to add a claim for fraud with respect to respondents' withholding and falsifying business records. (App., *infra*, A 20).

Prior to trial the parties stipulated that there was a lawful, valid bill of lading. Accordingly, petitioners withdrew their fraud in the inducement, negligence and gross negligence causes of action.

Trial commenced on March 1, 1993 and ended on March 5, 1993. The district court submitted to the jury three theories of liability : (1) a claim for loss and damage to property under the Carmack Amendment, (2) a claim for negligent misrepresentation of the terms of the protection plan, and (3) a tort claim for punitive damages based upon a federal common law theory of breach of the implied covenant of good faith and fair dealing in the transport of petitioners' belongings and the processing of their loss and damage claim.

In its charge to the jury, the district court specifically directed that damages, if any, for the federal common law tort claim were to be exclusive of damages awarded for actual loss under the contract or Carmack Amendment cause of action. The district court further directed the jury that it could award petitioners punitive

damages only if "defendants acted with such morally culpable conduct and wanton dishonesty so as to imply a criminal indifference to their civil obligations under the contract to transport (petitioners') household goods."

On March 5, 1993 the jury awarded petitioners $28,000.00 in compensatory damages under the Carmack Amendment cause of action. It found for the respondents on the negligent misrepresentation cause of action. The jury awarded petitioners $50,000.00 in punitive damages under petitioners' federal common law cause of action for respondents' bad faith tort of the breach of the implied covenant of good faith and fair dealing. Judgment confirming the jury's verdict was entered on March 8, 1993.

Respondents made post-judgment motions pursuant to Fed. R. Civ. Proc. 50(b) and 59

to set aside the punitive damages awarded and for a new trial. Petitioners' cross-moved for pre-judgment and post-judgment interest. On April 29, 1993 the district court denied respondents' motions to set aside the punitive damage award and for a new trial and granted petitioners' motion for interest. (App., *infra*, A 95). Judgment was entered on May 17, 1993.

Respondents filed a timely Notice of Appeal to the Second Circuit Court of Appeals on May 21, 1993. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. In its July 27, 1994 decision, (App., *infra*, 1 A) the court of appeals reversed the judgment of the district court insofar as it awarded petitioners' punitive damages under their federal common law causes of action but otherwise affirmed the district court's judgment.

The court of appeals acknowledged that this case presented a "legally complex question" (App., *infra*, A 10) which was complicated by the fact that there was no legislative history from which to divine the intent of Congress in enacting the Carmack Amendment. (App., *infra*, A 11). Accordingly, the court of appeals turned to this Court's decision in Adams Express Co. v. Croninger, 226 U.S. 491(1913) for guidance.

The court of appeals found that the Adams Express case described the Carmack Amendment in broad preeemptive terms which reasoned that to construe the Amendment's savings clause (a predecessor of 49 U.S.C. § 10103) as grounds for permitting state law remedies, would emasculate the Carmack Amendment itself. The court of appeals noted that while the Adams Express case and a host of circuit court cases stood for the

proposition that the Carmack Amendment preempts state common law remedies which might be asserted against a carrier for goods shipped under a bill of lading, such authority was not dispositive on the question of whether a federal common law remedy against a carrier would likewise be preempted, noting that the concept of preemption has no application where the law to be preempted, is a federal rule of common law" because "[f]ederal common law should not ordinarily lead to disparate treatment of defendants in different federal courts." (App., *infra*, A 13).

The court of appeals also took note of two district court cases which recognized that punitive damages were recoverable under federal common law in cases involving the scope and application of the Carmack Amendment. In Drucker v. O'Brien's Moving and Storage, Inc., 745 F.Supp. 616, (D.

Nev. 1990), aff'd on other gounds, 963 F.2d 1171 (9th Cir. 1992), the district court permitted a claim for breach of the implied covenant of good faith and fair dealing to be asserted under federal common law and awarded punitive damages. Likewise, in Miller v. AAACON Auto Transp. Inc., 447 F. Supp. 1201 (S.D. Fla. 1978) the district court opined that "punitive damages might be recoverable under federal common law, where a carrier has injured a plaintiff by acting with 'actual malice or reckless or wanton indifference to the rights of plaintiff'". Id. at 1205.

It is important to note, however, that in its discussion of whether the Carmack Amendment precluded an award of punitive damages under federal law, the court of appeals failed to address the Fourth Circuit case of Hubbard v. Allied Van Lines, 540 F.2d 1224 (4th Cir. 1976)

wherein the court concluded that the "Carmack Amendment itself presents no barrier to the recovery of punitive damages" under federal law. Id. at 1228.

In reaching its ultimate conclusion that a federal common law claim for punitive damages based upon the "breach of the implied covenant of good faith and fair dealing cannot exist alongside the Carmack Amendment" (App., *infra*, A 16), the court relied upon this Court's decision in Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914) and the more recent case Tenth Circuit case, A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F2d 833 (10th Cir. 1990). In both cases, state statutes awarding attorney's fees in Carmack cases were held not preempted by the Carmack Amendment because the statutes did not substantively enlarge the responsibility or liability of

the carrier. Reasoning that "punitive damage awards could have a dramatic effect on a carrier's liability and seriously enlarge a shipper's remedy" (App., *infra*, A 15) the court of appeals concluded that the award of punitive damages under federal common law tort claims was inconsistent with the Interstate Commerce Act and "would frustrate the uniformity goal of the Carmack Amendment." (App., *infra*, A 16).

REASONS FOR GRANTING THE PETITION

The reasoning expressed by the Second Circuit in its analysis of the Carmack Amendment's preemptive scope is at variance with the reasoning, and is in conflict in principle with, Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976) and Overbrook Farmers Union Cooperative Association v. Missouri Pacific Railroad Company, 21 F.3d 360 (10th Cir. 1994).

Further, the Second Circuit's decision in this case (App., *infra*, A 1) misconstrued and misapplied the opinions of this court in Adams Express Co. v. Croninger, 226 U.S. 491 (1913) and Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U.S. 412 (1914) with respect to the scope, purpose, and preemptive effect of the Carmack Amendment.

At the district court level, conflicting decisions exist in several circuits and a number of cases are pending which turn on the resolution of this issue. The need for guidance from this court is acute. This case provides a timely and rare opportunity to provide that guidance since, due to the nature of the claims brought by individual shippers and the delay and costs associated with an appeal, few district court decisions receive appellate review. Moreover, the decision below is erroneous,

the issues it addresses are important nationally and not heretofore considered by this Court.

I. THE COURT OF APPEAL'S INTERPRETATION OF THE CARMACK AMENDMENT CONFLICTS IN PRINCIPLE WITH THE FOURTH AND TENTH CIRCUITS' INTERPRETATION AND THAT OF SEVERAL DISTRICT COURTS

The principal reason expressed by the court of appeals for finding that the Carmack Amendment preempted petitioners' federal common law tort claim for punitive damages was that "punitive damage awards could have a dramatic impact on a carrier's liability ..., seriously enlarge a shipper's remedy ... (and) would frustrate the uniformity goal of the Carmack Amendment." (App., *infra*, A 15-16). However, other circuit courts and several district courts, in reaching the conclusion that punitive damage awards are permitted

under the Carmack Amendment, have reasoned otherwise.

In Hubbard v. Allied Van Lines, 540 F. 2d 1224, 1227 (4th Cir. 1976) the court, quoting this Court's decision in New York, Philadelphia & Norfolk R.R. v. Peninsula Produce Exchange, 240 U.S. 34 (1916), which said that the language of the Carmack Amendment was "'comprehensive enough to embrace all damages from any failure to discharge a carrier's duty'", held that punitive damages could be awarded. The Hubbard court noted that attempts to construe the language of the Carmack Amendment to preclude the award of punitive damages would require the court to "disregard the literal terms of the balance of its language and its evident overall meaning". Hubbard v. Allied Van Lines, supra at 1227. Accord, Southern Pacific Transportation Company v. United States of

America, 456 F.Supp. 931, 938 (E.D. Calif. 1978).

Further, the Hubbard court noted that the Carmack Amendment's savings clause, which preserves any remedy a shipper had under existing law, "refute(s) ...(the) ... implicit contention that Congress in passing the Carmack Amendment effected any general limitation on the liability of carriers under other laws." Hubbard v. Allied Van Lines, supra at 1228.

Thus, contrary to the holding of the Second Circuit in this case, the Fourth Circuit Hubbard case did not find the award of punitive damages to be fatally inconsistent with the purpose of the Carmack Amendment.

The Tenth Circuit's history of dealing with the issue of punitive damages in the context of Carmack Amendment cases is illustrative of the confusion and divergent

approaches existing in both the circuit and district courts which is in desperate need of clarification and guidance from this Court.

In 1971 the Tenth Circuit, in Litvak Meat Company v. Baker, 446 F.2d 329, 335 (1971) held that:

> The Carmack Amendment was not designed as a comprehensive restatement of the law, redefining with encyclopedic breath and detail all rights and responsibilities of interstate freight shippers and carriers.

Accordingly, the Litvak court held that the Carmack Amendment savings clause "did not oust all other remedial rights of shippers." Id. at 337. Ten years later, the Tenth Circuit again visited the issue in Reed v. AAACON Auto Transport Inc., 637 F.2d 1302 (1981). In the Reed case the court agreed with the Fourth Circuit Hubbard case and held that the Carmack Amendment did not preclude awards of punitive damages based on state common law

theories. Reed v. AAACON, supra at 1307. Then, in 1989 in Underwriters at Lloyds of London v. North American, 890, F.2d 1112 (10th Cir. 1989), the Tenth Circuit overruled its prior holdings in Litvak and Reed and held that the Carmack Amendment "preempts state common law remedies for negligent damage to goods shipped by a common carrier." Id. at 1113.

Although still holding that state common law remedies were preempted, one year later in 1990 the Tenth Circuit held that a state statute awarding attorney's fees in interstate shipping cases did not violate the purposes of the Carmack Amendment and thus, were not inconsistent with and thus not preempted by the Carmack Amendment because "it promotes settlement, encourages small well-founded claims and discourages unnecessary litigation". A.T. Clayton &

Co. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

Finally, in an opinion delivered in March of this year by the Hon. Circuit Judge Goodwin, one of the three judges deciding this case, the Tenth Circuit, in discussing the impact of punitive damages in common carrier cases, said:

> Common sense, as well as history, suggest that unless the possibility of punitive damages exists as a sanction for willful violations ... common carriers will be inclined to pursue a cost-benefit approach in deciding whether ... to pay compensatory damages ... History also teaches that ...(common carriers) have enjoyed a close, and often cordial relationship with the ICC over the last three quarters of a century. Thus, it is not surprising to find no ICC cases awarding punitive damages. Notwithstanding the trial court's argument that, in a proper case, punitive damages should be available as a remedy ... neither Congress nor the Supreme Court has yet defined what is a proper case. Overbrook Farmers Union Cooperative Association v. Missouri Pacific Railroad Co., 21 F.3d 360, 364 (10th Cir. 1994).

The Court then opined that "the savings clause could, in the proper case, allow

punitive damages for egregious violations of the Act." Id. Thus, the Tenth Circuit's apparent position is that punitive damages are not inconsistent with the purpose of the Carmack Amendment and are not preempted in cases of egregious violations, while the Second Circuit, even though noting that the equities in the instant case cry out for punitive damages, holds that such damages are inconsistent with and are preempted by the Carmack Amendment.

District courts from three other circuits which have had the occasion to pass on issue have held that the Carmack Amendment does not preempt federal common law causes of action for punitive damages.

Most on point is Drucker v. O'Brien's Moving and Storage, Inc., 745 F.Supp. 616 (D. Nev. 1990), aff'd on other grounds, 963 F.2d 1171 (9th Cir. 1992) a case recognized by the Second Circuit but not followed. In

a remarkably similar fact pattern to that of this case, the district court recognized the federal common law tort of breach of the implied covenant of good faith and fair dealing in a contract controlled by the Carmack Amendment and permitted the recovery of punitive damages on the claim. Id. at 622.

In another case taken note of by the Second Circuit but not followed, the district court in Miller v. AAACON Auto Transport, Inc., 447 F.Supp. 1201, 1205 (S.D. Fla. 1978) recognized that punitive damages are "recoverable under federal common law, where a carrier has injured a (shipper) by acting with 'actual malice or reckless or wanton indifference to the rights of the (shipper).'"

In Wright v. Chicago, Burlington & Quincy Railroad Company, 223 F.Supp. 660, 662 (N.D. Ill. 1963) the district court

recognized that punitive damages could be awarded against common carriers who were subject to the jurisdiction of the Interstate Commerce Act.

In further conflict in principle with the reasoning of the Second Circuit is the Eighth Circuit decision in Caspe v. AAACON Transportation, Inc., 658 F.2d 613 (8th Cir. 1981) which, although not dealing with punitive damages, illustrates the point that federal common law remedies are available to shippers in addition to those contained in the Interstate Commerce Act.

The Court in Caspe, citing to Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), held that it had the inherent power under federal common law to award attorney's fees in appropriate cases. Thus, although an interstate commerce case subject to the jurisdiction of the Interstate Commerce Act, the court

apparently did not consider the Carmack Amendment as preemptive of a shipper's federal common law remedies. Caspe v. AAACON, at 618.

As a result of the difficulty facing individual shippers in securing appellate review, district courts will only rarely obtain guidance from the federal courts of appeal on this issue, and, as noted above, that guidance is often inconsistent and divergent. This case presents the Court with a rare opportunity to provide clarification and promote uniformity on these issues, and the Court should take it.

II. THE DECISION OF THE COURT OF APPEALS MISAPPLIES SUPREME COURT PRECEDENT AND IS ERRONEOUS.

The Second Circuit concluded that because Congress "comprehensively and directly" addressed the issue of a shipper's remedies in enacting the Carmack

Amendment, petitioners' could not recover punitive damages under a federal common law tort cause of action for breach of the implied covenant of good faith and fair dealing. In reaching its conclusion, the court of appeals relied on, but misapplied this Court's decisions in Adams Express Co. v. Croninger, 226 U.S. 491 (1913) and Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914).

The Second Circuit at one point in it decision correctly observed that the Adams Express case dealt solely with the issue of preemption of state common law causes of action and not the federal common law cause of action at issue in this case (App., *infra* A 12) and that preemption has no application where the law to be preempted is a federal rule of common law. (App., *infra*, A 13)

In the context of discussing the Carmack Amendment's preemption of state common law, this Court in the Adams Express case considered the impact of the proviso contained in the Carmack Amendment, then 49 U.S.C. § 20 (11), which stated "nothing in this section shall deprive any (shipper) of any remedy or right of action which he has under existing law." The Court quoting Texas Pacific Railway v. Abilene Cotton Mills, 204 U.S. 426, said that the proviso

> "'evidently only intended to continue in existence such other rights or remedies ... whether given by the Interstate Commerce Act, or by state statute, or common law not inconsistent with the rules and regulations prescribed by the provisions of this act ... [T]he act cannot be said to destroy itself.'"
>
> Adams Express v. Croninger, supra at 507.

Based upon the foregoing, the court of appeals found that the savings clause did not apply to the petitioners' federal

common law tort claim and held it preempted by the Carmack Amendment.

However, in the paragraph following the language relied upon by the court of appeals to preempt petitioners' federal common law claim, the Court in Adams Express expressed the following opinion:

> To construe this proviso as preserving ... any right or remedy which he may have had under existing federal law ... gives to it a more rational interpretation...(Emphasis supplied) Id.

Thus this Court in Adams Express clearly recognized that existing federal remedies were not, as the Second Circuit wrongly concluded, automatically preempted.

Likewise, in Missouri, Kansas & Texas Railway Co. v. Harris, 234 U.S. 412 (1914) this Court held that the recovery by the shipper of his attorney's fees under a Texas statute did not "in anywise either enlarge or limit the responsibility of the carrier for the loss of property entrusted

to it in transportation." Id. p. 234. In addition, the Court held that the "application of [the] statute to actions for goods lost in interstate commerce is not inconsistent with the provisions of the Commerce Act and its amendments" and therefore not preempted by the Carmack Amendment. (Emphasis supplied) Id. at 421.

Thus, the Harris court established the standard of review when state statutory provisions involve common carriers subject to regulation by the Interstate Commerce Act and, in particular, the Carmack Amendment. This standard of review was more recently restated in the Tenth Circuit as whether the state statute affecting the common carrier "substantively enlarges the carrier's responsibility." A.T. Clayton & Co. v. Missouri-Kansas-Texas R.R., 901 F.2d 833, 835 (10th Cir. 1990).

Notwithstanding that the standard of review first espoused in Harris and later restated in Clayton was clearly restricted to the analysis of state statutory provisions vis-a-vis their impact on common carriers, the Second Circuit improperly misapplied this state law standard of review to claims asserted by the petitioner under federal common law and held the claim preempted by the Carmack Amendment.

It is respectfully submitted that the proper test for determining whether punitive damages may be awarded under federal common law is set forth in the savings clause itself.

Originally the savings clause language was cast in terms of preserving to a shipper all remedies "under existing law." 49 U.S.C. § 20(11). As now recodified the, savings clause provides that the remedies in the Act are "in addition to remedies

existing ... at common law." 49 U.S.C. § 10103. Thus, the relevant inquiry and test of whether punitive damages may be awarded under federal common law against a common carrier subject to the jurisdiction of the Carmack Amendment is whether the recovery of punitive damages was available under federal common law at the time of the enactment of the Carmack Amendment, not its presently preceived impact on carrier liability.

In 1893, just after the enactment of the Interstate Commerce Act of 1887 and prior to the 1906 enactment of the Carmack Amendment, this Court summarized the state of the law of punitive damages in the context of common carriers subject to the jurisdiction of the Interstate Commerce Act. This Court said:

> The recovery of damages, beyond compensation for the injury received, by way of punishing the guilty, and as an example to deter others from offending

> in like manner, is here clearly recognized.
>
> In this court, the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations.
>
> Lake Shore & Michigan Southern Railway Co. v. Prentice, 147 U.S. 101, 107 (1893)

See also, Smith v. Wade, 461 U.S. 30, 47 (1983) (holding "the common law, both in 1871 and now, allows recovery of punitive damages in tort cases not only for actual malicious intent, but also for reckless indifference to the rights of others")

In Lysaght v. Lehigh Valley R. Co., 254 F.351 (S.D.N.Y. 1918), aff'd. 271 F. 906 (2nd Cir. 1921), cert. denied, 256 U.S. 704 (1922) the noted jurist Learned Hand, writing in the period immediately following the 1916 Cummins Amendments explained the

meaning of the savings clause then in effect saying:

> The phrase "existing law" means existing common law as understood in the federal courts and excludes changes effected by state statute.
>
> Id. at 353.

Judge Hand further noted:

> There cannot be any doubt that section 20 (the Carmack Amendment) was intended to adopt the carrier's liability as it was understood at that time ...(and) ... that the proviso of section 20 incorporates unyieldingly the exact status of the federal common law into the statute ...(and) ... it certainly does affirm the general liability of carriers so derived as a part of the statute as a whole." (Emphasis supplied).
>
> Id. at 354.

Thus, based upon Judge Hand's analysis not only does the Carmack Amendment not preempt the federal common law of punitive damages as a shipper's remedy with respect to common carriers because such punitive damages were part of the existing federal common law, the savings clause actually "incorporates" and "adopts" the

availability of punitive damages as a remedy available to a shipper, in a proper case, into the statute itself. Accordingly, regardless of whether the federal common law remedies for punitive damages were preserved by the savings clause or incorporated into and made a part of the Carmack Amendment itself, punitive damages are an appropriate remedy and may properly be awarded to petitioners in this case.

Finally, this Court has held that a statute should be interpreted in a way that gives effect to all of its provisions. See, Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985). If the Carmack Amendment's savings clause were construed in the way urged by the Second Circuit, the main body of the provision, preserving remedies existing at common law, would have no

meaning or effect. Thus, the court of appeals' construction must be rejected.

Accordingly, the language of the Carmack Amendment's savings clause, construed in light of the federal common law existing at the time it was enacted, contradicts the court of appeals' decision. This Court should grant the petition to correct the Second Circuit error.

III. THE QUESTIONS PRESENTED ARE IMPORTANT

This cases arises out of a shipping contract for the move of petitioners' household goods in interstate commerce. The Annual Performance Report of the Interstate Commerce Commission for 1990 (the last year figures are available) indicates that in 1990 there were 356,163 shipments made by individual shippers in the United States. When commercial shippers and government shipments are

included, the total number of shipments made in interstate commerce and handled by common carriers subject to the jurisdiction of the Interstate Commerce Commission reaches 957,679. Claims were filed by shippers against carriers with respect to 4.27% of all such moves, equating to over 40,000 claims filed per year.

Thus, the issues regarding limitations on carrier liability, good faith and fair dealing in the claims settlement process and the remedies available to shippers to recover damages from carriers raised in this case are issues recurring virtually daily and effecting a large group of consumers.

The fact that petitioners' suit is <u>not</u> a unique case or isolated aberration of shipping industry practices and the claims adjustment process is borne out by the large number of reported cases in both

federal and state courts which recount the same indifference, fraud, misrepresentation, and bad faith settlement practices engaged in by common carriers against shippers.

Cases in federal district courts and circuit courts of appeal demonstrate a degree of diverse and conflicting voices regarding the issues raised in this case. A considerable number of cases are pending in district and circuit courts which turn on the resolution of the issues presented in this case. The need for this Court to provide guidance and clarification because of the divergent approaches being taken by the circuit and district courts is acute.

Further, due to the nature and dollar value of the claims brought by individual shippers, this case provides a rare opportunity to provide the clarification and guidance needed since relatively few dis-

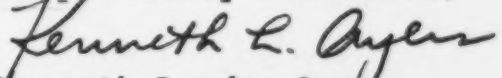
trict court decisions receive appellate review. Absent this Court's intervention, the law developing in the lower courts involving interstate shipments will promote inequity and result in chaos.

Finally, not only are the issues presented in this case important nationally, but they have heretofore not been addressed by this Court. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,



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